

MORGAN, LEWIS & BOCKIUS LLP  
John S. Battenfeld, Bar No. 119513  
[john.battenfeld@morganlewis.com](mailto:john.battenfeld@morganlewis.com)  
Brian D. Fahy, Bar No. 266750  
[brian.fahy@morganlewis.com](mailto:brian.fahy@morganlewis.com)  
300 South Grand Avenue  
Twenty-Second Floor  
Los Angeles, CA 90071-3132  
Tel: +1.213.612.2500  
Fax: +1.213.612.2501

MORGAN, LEWIS & BOCKIUS LLP  
Amy A. McGeever, Bar No. 296758  
[amy.mcgeever@morganlewis.com](mailto:amy.mcgeever@morganlewis.com)  
One Market, Spear Street Tower  
San Francisco, CA 94105  
Tel: +1.415.442.1000  
Fax: +1.415.442.1001

Attorneys for Defendant  
AMAZON LOGISTICS, INC. incorrectly sued as  
AMAZON.COM, LLC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

YOLANDA CHAMPION, on behalf of herself,  
all others similarly situated,

**Plaintiff,**

VS.

AMAZON.COM LLC., a Delaware limited liability company; NEA DELIVERY, LLC d/b/a FAST DELIVERY SERVICES, a California limited liability company; and DOES 1 through 50, inclusive,

## Defendants.

Case No. 3:18-cv-05222-MMC

**DEFENDANT AMAZON LOGISTICS' NOTICE OF MOTION AND MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO DISMISS, OR IN THE ALTERNATIVE, STAY THE PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF RICHARD NYHAN AND BRIAN FAHY**

Hon. Maxine M. Chesney

Date: June 14, 2019  
Time: 9:00 a.m.  
Courtroom: 7

1                   **TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN**  
 2                   **DISTRICT OF CALIFORNIA AND TO PLAINTIFF AND HER ATTORNEYS OF**  
 3                   **RECORD:**

4                   **PLEASE TAKE NOTICE THAT** on June 14, 2019 at 9:00 a.m. (or as soon thereafter as  
 5 the matter may be heard in Courtroom 7, of the above-entitled Court), Defendant Amazon  
 6 Logistics, Inc. incorrectly sued as Amazon.Com, LLC (“Amazon”) will move the Court for an  
 7 order compelling Plaintiff Yolanda Champion to submit her claims against Amazon and  
 8 Defendant NEA Delivery LLC to final and binding arbitration on an individual basis and to  
 9 dismiss her class and collective action claims, and to dismiss, or in the alternative, stay this action  
 10 pending resolution of Plaintiff’s claims in the arbitral forum. Amazon seeks to enforce the  
 11 Binding Arbitration Agreement under equitable estoppel, agency, and third party beneficiary  
 12 theories.

13                  The foregoing motion is based on this notice of motion, the accompanying memorandum  
 14 of points and authorities, the declarations of Richard Nyhan and Brian Fahy filed concurrently  
 15 herewith and all exhibits attached thereto, all pleadings and motions on file in this action, and on  
 16 such further written or oral argument as may be permitted by this Court.

17                  **STATEMENT OF RELIEF SOUGHT**

18                  Defendant respectfully requests that this Court grant its motion to compel individual  
 19 arbitration of all of Plaintiff’s claims and dismiss Plaintiff’s class and collective action claims,  
 20 and dismiss, or in the alternative, stay the action pending arbitration.

21                  Dated: May 10, 2019

22                  MORGAN, LEWIS & BOCKIUS LLP

23                  By /s/ Brian D. Fahy

24                  John S. Battenfeld

25                  Brian D. Fahy

26                  Amy A. McGeever

27                  Attorneys for Defendant AMAZON  
 LOGISTICS, INC. (incorrectly sued as  
 AMAZON.COM, LLC)

1

2 **I. INTRODUCTION AND REQUESTED RELIEF**

3 In contravention of an agreement to arbitrate any and all employment-related disputes on  
 4 an individual basis, Plaintiff Yolanda Champion filed a class and collective action lawsuit against  
 5 Defendants Amazon.com, LLC (“Amazon”)<sup>1</sup> and NEA Delivery, LLC (“NEA”) d/b/a Fast  
 6 Delivery Services (hereinafter collectively “Defendants”), alleging various wage and hour claims  
 7 under California law and the FLSA. The Court should compel Plaintiff to arbitrate her claims on  
 8 an individual basis.

9 Plaintiff entered into a written, binding agreement to resolve her employment-related  
 10 disputes exclusively through binding arbitration on an individual basis and agreed to be bound by  
 11 the Binding Arbitration Agreement, which is governed by the Federal Arbitration Act (“FAA”).  
 12 As the U.S. Supreme Court has repeatedly confirmed, the FAA reflects “a liberal federal policy  
 13 favoring arbitration” requiring courts to enforce arbitration agreements according to their terms.  
 14 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749, 179 L. Ed. 2d 742 (2011) (internal  
 15 quotation omitted). Recently, in *Lamps Plus, Inc. v. Varela*, 587 U.S. \_\_\_\_ (2019) and *Epic*  
 16 *Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1616, 1632 (2018), the Supreme Court definitively held  
 17 that, under the FAA, arbitration agreements providing for individualized proceedings must be  
 18 enforced as written. Pursuant to *Concepcion* and *Epic Systems*, class and collective action  
 19 waivers must be enforced by a court and any state law to the contrary is preempted. The Court,  
 20 therefore, should compel the action to arbitration on an individual basis and dismiss Plaintiff’s  
 21 class and collective action claims, or in the alternative, stay the action pending arbitration.

22 **II. STATEMENT OF RELEVANT FACTS**

23 **A. FACTUAL BACKGROUND**

24 **1. The Parties**

25 Defendant NEA Delivery, LLC’s (“NEA”) business involved its delivery drivers making  
 26 local deliveries in small vans or passenger vehicles (which did not require a commercial drivers’  
 27 license to operate) for its customers, including Amazon, in the states in which NEA operated.

---

28 <sup>1</sup> Plaintiff incorrectly sued Amazon.com, LLC. The proper entity is Amazon Logistics, Inc.

1 Declaration of Richard Nyhan ¶ 5. Defendant Amazon, among other things, operates an online  
 2 retail shopping service through which consumer merchandise and other products may be  
 3 purchased from Amazon or third-party sellers.

4 Plaintiff Champion (“Plaintiff”) delivered packages for NEA to Amazon customers.  
 5 Compl. ¶¶ 21, 22; Nyhan Decl. ¶ 6. She picked up packages from an Amazon distribution center  
 6 located in San Leandro, California. Nyhan Decl. ¶ 6. All of Plaintiff’s deliveries were made to  
 7 local customers—she did not leave California to make any deliveries. *Id.*

8           **2. The Parties Entered Into a Written Arbitration Agreement That  
 9           Includes a Class Action Waiver Provision.**

10           On March 24, 2017, Plaintiff electronically signed the Binding Arbitration Agreement  
 11 (“Agreement”) with NEA. Nyhan Decl. ¶ 4, Exh. A. Pursuant to the underlined heading  
 12 “Agreement to Arbitrate Disputes,” the Agreement provides, in relevant part, as follows:  
 13 I agree and acknowledge that … NEA Delivery, LLC (my “Worksite Employer”), and I will  
 14 utilize binding arbitration to resolve all disputes that may **arise out of the employment context.**”  
 15 *Id.* Under the bilateral Agreement, Plaintiff further agreed that her claims against NEA and its  
 16 agents would be subject to arbitration under the FAA. *Id.* at 1.A. (“I agree that **any claim,**  
 17 **dispute, and/or controversy that either I may have against my Worksite Employer [NEA] ...**  
 18 **or their respective owners, directors, officers, managers, employees, agents ... or that my**  
 19 **Worksite Employer... may have against me, arising from, related to, or having any**  
 20 **relationship or connection whatsoever with my ... employment by, or any other association**  
 21 **with my Worksite Employer... shall be submitted to and determined exclusively by binding**  
 22 **arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) in conformity with the**  
 23 **procedures of the California Arbitration Act ...”** (Emphasis added.)

24           The Agreement also contains a class action and collective action waiver provision, stating  
 25 that Plaintiff’s claims “must be brought in my individual capacity ... and not as a plaintiff or class  
 26 member in any purported class action, collective action or representative action proceeding.” *Id.*  
 27 at 1.C.

1           The Agreement was not mandatory. Plaintiff had a right to opt out of arbitration within 30  
 2 days. *Id.* at 1.D. However, she did not do so. Nyhan Decl. ¶ 4.

3           **B. PROCEDURAL BACKGROUND**

4           On August 24, 2018, Plaintiff filed this putative class and collective action in the Northern  
 5 District of California, alleging that NEA and Amazon (collectively “Defendants”) improperly  
 6 classified her, and allegedly similarly situated individuals, as independent contractors and that  
 7 “each defendant acted in all respects pertinent to this action as the agent of other defendants,  
 8 carried out a joint scheme, business plan or policy ...” Dkt. 1, Compl. ¶¶ 1, 9 (emphasis added).<sup>2</sup>  
 9 Plaintiff brings claims for alleged (1) failure to provide meal periods; (2) failure to provide rest  
 10 periods; (3) failed to pay hourly wages; (4) failure to provide accurate wage statements; (5)  
 11 waiting time penalty for failure to timely pay all final wages; (6) Unfair Competition Law  
 12 (“UCL”) violations; and (7) failure to pay all hours worked under the FLSA (29 U.S.C. § 201).

13 *Id.*

14           This action was originally assigned to Judge Chen. However, Amazon filed an  
 15 Administrative Motion to Consider whether this action should be related to the Miller action, in  
 16 light of the similarities in class definitions alleged in this action and Miller. *See* Dkt. 31.  
 17 Specifically, both actions purport to represent a class comprised of all employees of all Amazon  
 18 delivery service providers (“DSPs”) in California. This Court determined that this action was  
 19 related to *Miller*, which resulted in this action being transferred to this Court. *See* Dkt. 33. The  
 20 parties filed a stipulation requesting that the Court set a briefing schedule first on Amazon’s  
 21 motion to compel arbitration, as the parties agree the Court’s ruling on this motion could obviate  
 22 the need for any other responsive motions.<sup>3</sup>

23  
 24 <sup>2</sup> Contrary to the complaint, Plaintiff was classified as an employee of NEA. Nyhan Decl. ¶ 4.  
 25 <sup>3</sup> If the Court declines to compel arbitration, and as stated in the stipulation, Amazon plans to  
 26 bring a motion to dismiss and/or strike Plaintiff’s vague, ambiguous, and overbroad class  
 27 definition, and dismiss or sever the class claims purporting to represent Amazon Flex Delivery  
 28 Partners. Plaintiff was never an Amazon Flex Delivery Partner, and there are first-filed, pending  
 actions in the Northern District and other federal courts and several state courts where Amazon  
 Flex Delivery Partners have brought claims alleging they were misclassified as independent  
 contractors. *See Keller v. Amazon*, Case No. 4:17-cv-02219, and *Ponce v. Amazon*, Case No.  
 3:17-cv-00288, which Judge Seeborg determined were related and both actions are pending  
 before him.

1           Counsel for Amazon provided Plaintiff's counsel with Plaintiff's executed Agreement.

2 Declaration of Brian Fahy ¶ 2. Plaintiff has refused to submit to arbitration. *Id.*

3           **III. LEGAL ARGUMENT**

4           **A. PLAINTIFF'S CLAIMS SHOULD BE COMPELLED TO ARBITRATION.**

5           Plaintiff expressly agreed to binding, individual arbitration of all the claims she attempts  
6 to assert in this action. Plaintiff's claims should be compelled to arbitration on an individual  
7 basis.

8           **1.       The FAA requires Federal Courts to Compel Arbitration.**

9           The Agreement states that it is governed by the FAA. Nyhan Decl. at Exh. A (at ¶ 1.A.).  
10 The FAA requires federal courts to compel the arbitration of any claims covered by a valid  
11 arbitration agreement. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (“By its  
12 terms, the Act . . . mandates that district courts shall direct the parties to proceed to arbitration on  
13 issues as to which an arbitration agreement has been signed.”). Consistent with our “national  
14 policy favoring arbitration when the parties contract for that mode of dispute resolution,” *Preston*  
15 *v. Ferrer*, 552 U.S. 346, 349 (2008), Section 2 of the FAA mandates that arbitration agreements  
16 “shall be valid, irrevocable, and enforceable” to the same extent as any contract, and Section 4  
17 commands that a district court “shall” issue “an order directing the parties to proceed to  
18 arbitration in accordance with the terms of [their] agreement.” 9 U.S.C. §§ 2, 4; *see also Am. Exp.*  
19 *Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (the FAA “reflects the overarching  
20 principle that arbitration is a matter of contract . . . [a]nd consistent with that text, courts must  
21 rigorously enforce arbitration agreements according to their terms”) (quotations omitted) (“*Italian*  
22 *Colors.*”) Any doubts as to the arbitrability of any issue must be resolved in favor of arbitration.  
23 *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). To that end, the FAA requires courts  
24 to “rigorously enforce agreements to arbitrate.” *Id.* at 626; *see, e.g., Cobarruviaz v. Maplebear,*  
25 *Inc.*, 143 F. Supp. 3d 930 (N.D. Cal. 2015) (compelling arbitration for independent contractors  
26 alleging misclassification claims under FLSA and California law); *see also Perry v. Thomas*, 482  
27 U.S. 483, 490 (1987) (upholding arbitration agreement and compelling arbitration of claim for  
28 unpaid wages under the California Labor Code); *McManus v. CIBC World Mkts. Corp.*, 134 Cal.

1 Rptr. 2d 446 (2003) (compelling arbitration of California Labor Code claims); *Epic Systems*, 138  
 2 S.Ct. at 1628 (compelling individual arbitration of FLSA and state law claims).

3 On a motion to compel, the FAA limits a court's inquiry to "determining (1) whether a  
 4 valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the  
 5 dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008). When  
 6 the determination is affirmative as to both questions, the FAA "requires the court to enforce the  
 7 arbitration agreement in accordance with its terms." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,  
 8 207 F.3d 1126, 1130 (9th Cir. 2000). Here, Amazon easily answers both questions in the  
 9 affirmative; as a result, Plaintiff's claims must be compelled to individual arbitration in  
 10 accordance with the terms of the Agreement.

11 **2. Plaintiff Agreed to Be Bound by A Valid Arbitration Agreement.**

12 Plaintiff cannot dispute that she is bound by the terms of the Agreement. Plaintiff  
 13 electronically signed the Agreement. Nyhan Decl. ¶ 3.<sup>4</sup> Under the FAA, an arbitration  
 14 agreement is enforceable "save upon such grounds as exist in law or in equity for the revocation  
 15 of any contract." 9 U.S.C. § 2. The effect of Section 2, "is to create a body of federal substantive  
 16 law of arbitrability, applicable to any arbitration agreement..." *Perry v. Thomas*, 482 U.S. 483,  
 17 489 (1987). Although Section 2 allows a court to refuse to enforce an arbitration agreement,  
 18 "upon such grounds as exist at law or equity for the revocation of any contract," 9 U.S.C. § 2, this  
 19 savings clause does not "preserve state-law rules that stand as an obstacle to the accomplishment  
 20 of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

21 In *Armendariz v. Found. Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 98 (2000), the  
 22 California Supreme Court applied a "sliding scale" analysis to determine whether an arbitration

---

23 <sup>4</sup> "A party's acceptance of an agreement to arbitrate may be express . . . A signed agreement is  
 24 not necessary, however, as a party's acceptance may be implied in fact." *Pinnacle Museum*  
*Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 236 (2012). An employee's  
 25 continued employment constitutes implied in fact acceptance of an arbitration agreement  
 proposed by the employer. *Craig v. Root and Brown & Root, Inc.*, 84 Cal. App. 4th 416, 420  
 26 (2000) (cited with approval by *Pinnacle Museum*, 55 Cal. 4th at 1224).<sup>4</sup> Further, the FAA also  
 27 does not require that an arbitration agreement is signed. *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*,  
 28 815 F.2d 840, 846 (2d Cir. 1986) (under the FAA, "a party may be bound by an agreement to  
 arbitrate even absent a signature.... [W]hile the Act requires a writing, it does not require that the  
 writing be signed by the parties."); *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437, 1439 (9th Cir. 1994)  
 (same).

1 agreement was enforceable pursuant to the doctrine of unconscionability. “[T]he more  
 2 substantively oppressive the contract term, the less evidence of procedural unconscionability is  
 3 required to come to the conclusion that the term is unenforceable, and vice versa.” *Id.* at 114.  
 4 Whether and the degree to which the *Armendariz* decision remains valid in light of the Supreme  
 5 Court’s decision in *Concepcion* remains undecided and unresolved. It is clear, however, that state  
 6 law cannot hold agreements to arbitrate to a higher standard than is generally applicable to other  
 7 contracts without running afoul of the FAA. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984);  
 8 *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Further, state law cannot act to  
 9 prohibit arbitration of certain types of claims or require certain types of procedures as a  
 10 prerequisite to arbitration. *Concepcion*, 131 S. Ct. at 1747; *Marmet Health Care Center, Inc. v.*  
 11 *Brown*, 132 S. Ct. 1201, 1203-1204 (2012); *Italian Colors*, *supra*, 133 S. Ct. at 2310. Indeed, a  
 12 paramount purpose behind the FAA involved ending state roadblocks to the enforcement of  
 13 agreements to arbitrate. *Southland*, 465 U.S. at 10. Here, there is no question that the Agreement  
 14 is enforceable as to Plaintiff’s claims.

15                   **a. The Agreement Is Not Procedurally Unconscionable.**

16                   Procedural unconscionability refers to “oppression” or “surprise” due to unequal  
 17 bargaining power that results in no real negotiation and an absence of meaningful choice.  
 18 *Pinnacle Museum*, 55 Cal. 4th at 247. The procedural element of unconscionability may arise in  
 19 connection with adhesion contracts, but the finding of an adhesion contract does not “per se”  
 20 render the arbitration agreement unenforceable. *Id.*; *see also Graham v. Scissor-Tail, Inc.*, 28  
 21 Cal. 3d 807, 817 (1981); *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal. App. 4th 1105,  
 22 1127 (1999) (citing cases to demonstrate that even “a compulsory predispute arbitration  
 23 agreement is not rendered unenforceable just because it is required as a condition of employment  
 24 or offered on a ‘take it or leave it’ basis”). Here, the Agreement was not mandatory as explained  
 25 above. The Court must initially presume that the contract is valid and was negotiated at arm’s  
 26 length, i.e., “fair and regular.” Cal. Civil Code § 3545.

27                   Here, the Agreement is provided as a stand-alone document entitled, “**Binding**  
 28 **Arbitration Agreement.**” Nyhan Decl. at Exh. A (emphasis in original). Above her signature in

1 large bold, capital letters, Plaintiff is advised, “**DO NOT SIGN UNTIL YOU HAVE READ**  
 2 **THIS AGREEMENT.**” *Id.* (emphasis in original). Moreover, despite the opportunity to opt-out  
 3 of arbitration, Plaintiff did not submit an opt-out form. Nyhan Decl. ¶ 4.

4                   **b. The Agreement Is Not Substantively Unconscionable.**

5 Substantive unconscionability focuses on the one-sidedness or overly harsh effect of the  
 6 contract. *Armendariz*, 24 Cal. 4th at 114. California courts provide that to establish substantive  
 7 unconscionability, the terms must be “so one-sided as to shock the conscience.” *Kinney v. United*  
 8 *HealthCare Services, Inc.*, 70 Cal. App. 4th 1322, 1330 (1999). The California Supreme Court  
 9 held in *Armendariz* that the following five standards must be met in a mandatory employment  
 10 arbitration agreement: a neutral arbitrator, adequate discovery, a written award, the availability of  
 11 all of the types of relief that would otherwise be available in court, and payment by the employer  
 12 of any arbitration fees beyond what the employee would have to pay in court. *Armendariz* at  
 13 102-114. The Agreement satisfies each of the *Armendariz* standards. See Nyhan Decl. at Exh. A  
 14 (e.g. “the arbitrator shall be a retired California Superior Court Judge, or otherwise qualified  
 15 individual to whom the parties mutually agree”; “all of the Act’s other mandatory and permissive  
 16 rights to discovery”; “Awards shall include the arbitrator’s written reasoned opinion.”; “my  
 17 Worksite Employer … agree to pay all types of costs that are unique to arbitration…”). Thus,  
 18 Plaintiff cannot legitimately argue that the Agreement is substantively unconscionable.

19                   **3. All of Plaintiff’s Claims Must Be Arbitrated Individually.**

20 Plaintiff alleges Labor Code and FLSA violations against all Defendants arising out of her  
 21 employment. Under the Agreement, Plaintiff expressly agreed that “any claim, dispute, and/or  
 22 controversy that either I may have against my Worksite Employer [NEA]… arising from, related  
 23 to, or having any relationship or connection whatsoever with my seeking employment with,  
 24 employment by, or any other association with my Worksite Employer… shall be submitted to and  
 25 determined exclusively by binding arbitration.” Nyhan Decl. ¶ 4, Exh. A. Agreements to  
 26 arbitrate employment-related claims, including Labor Code and FLSA wage and hour claims like  
 27 those at issue here, are enforceable under the FAA. See, e.g., *Epic Systems*, 138 S.Ct. at 1628;  
 28 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 , 371-372(2014). Therefore, all of

1 Plaintiff's claims are covered by the Agreement.

2 Further, Plaintiff may not maintain her claims on a class or collective basis, because she  
3 agreed to arbitrate any and all claims on an individual basis only. The Agreement provides:

4 I understand and agree that **all claims that I may have against my**  
5 **Worksite Employer... must be brought in my individual capacity** and  
6 not as a plaintiff or class member in any purported class action, collective  
7 action or representative action proceeding.... The Arbitrator shall not  
8 consolidate claims of different alleged employees into one proceeding, nor  
shall the Arbitrator have the power to her arbitration as a class action,  
collective action, or representative action.

9 Nyhan Decl. ¶ 4, Exh. A (at 1.C.) (emphasis added). Accordingly, Plaintiff's class and collective  
10 action claims should be dismissed, and Plaintiff should be compelled to arbitrate on an individual  
11 basis only. An arbitration agreement waiving class and collective action procedures is fully  
12 enforceable. In *Concepcion*, the Supreme Court overruled prior California law limiting  
13 enforcement of class action waivers. *Concepcion*, 131 S. Ct. at 1747-53. Since *Concepcion*,  
14 California courts have also enforced class action waivers. See, e.g., *Iskanian*, 59 Cal. 4th at 363-  
15 66 (finding class action waivers in arbitration agreements enforceable). More recently, in *Epic*  
16 *Systems*, 138 S.Ct. at 1616, the Supreme Court definitively held that, under the FAA, arbitration  
17 agreements providing for individualized proceedings must be enforced as written. It therefore  
18 enforced arbitration agreements waiving the right to bring class and collective action claims.

19 As explained above, the Agreement contains a valid, enforceable class and collective  
20 action waiver, and the requirement that all claims be arbitrated on an individual basis is expressly  
21 drafted. Because Plaintiff has waived the right to bring class or collective action claims against  
22 Defendants, the Court should compel all of her claims to arbitration on an individual basis and  
23 dismiss her class and collective action claims.

24 **4. The Agreement is Enforceable by Amazon Under Equitable Estoppel,  
25 Agency, and Third Party Beneficiary Theories.**

26 Amazon is not a signatory to the Agreement. California law does not require it to be a  
27 party to the Agreement in order to enforce it here under equitable estoppel, agency, and third  
party beneficiary theories. Because Plaintiff alleges that Amazon is an agent of NEA, Amazon

1 has a right to enforce the Agreement and compel Plaintiff's wage claims and employment-related  
 2 disputes to arbitration.

3 California courts recognize that a nonsignatory to an arbitration agreement may compel  
 4 arbitration against a signatory on equitable estoppel and agency grounds. *See Garcia v. Pexco*, 11  
 5 Cal. App. 5th 782, 788 (2017); *Boucher v. Alliance Title Co., Inc.*, 127 Cal. App. 4th 262, 271-72  
 6 (2005); *Metalclad Corp. v. Ventana Env'tl. Org. P'ship*, 109 Cal. App. 4th 1705, 1713 (2003)  
 7 ("[T]he equitable estoppel doctrine applies when a party has signed an agreement to arbitrate but  
 8 attempts to avoid arbitration by suing nonsignatory defendants for claims that are 'based on the  
 9 same facts and are inherently inseparable.'"). Pursuant to the equitable estoppel doctrine, "a  
 10 nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to  
 11 arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in  
 12 and intertwined' with the underlying contract obligations." *Boucher*, 127 Cal. App. 4th at 271.  
 13 Signatory plaintiffs making statutory claims can be compelled to arbitrate their claims against  
 14 nonsignatory defendants if the claims involve the same factual allegations as the claims made  
 15 against the signatory defendants and thus are inherently inseparable from the claims against the  
 16 signatory defendants. *Laswell v. AG Seed Beach, LLC*, 189 Cal. App. 4th 1399, 1407 (2010).

17 Courts routinely hold that alleged agents of a party to an arbitration agreement can compel  
 18 arbitration so long as (1) the alleged wrongful acts of the agents relate to or are done in their  
 19 alleged capacities as agents and (2) the claims against the alleged agents arise out of or relate to  
 20 the contract containing the arbitration clause. *Garcia*, 11 Cal. App. 5th at 788 (non-signatory  
 21 defendant may enforce an arbitration agreement "when a plaintiff alleges a defendant acted as an  
 22 agent of a party to an arbitration agreement"); *Leitzia v. Prudential Bache Secs., Inc.*, 802 F.2d  
 23 1185 (9th Cir. 1986); *Dryer v. L. A. Rams*, 40 Cal. 3d 406, 418 (1985). Here, Plaintiff's alleges  
 24 that "***each defendant acted in all respects pertinent to this action as the agent of other***  
 25 ***defendants***, carried out a joint scheme, business plan or policy ..." Dkt. 1, Compl. ¶ 9 (emphasis  
 26 added). Amazon is thus entitled to enforce the Agreement as the alleged agent of the  
 27 Agreement's signatory, NEA. *Garcia*, 11 Cal. App. 5th at 788.

28 In *Garcia*, the appellate court upheld the lower court's ruling that an arbitration agreement

1 between a staffing agency and its employee was enforceable as to a non-signatory client employer  
 2 because, “Labor Code violations are clearly, and indeed expressly, included as one of the types of  
 3 disputes covered by the arbitration agreement.” *Garcia* 11 Cal. App. 5th at 786. The *Garcia*  
 4 plaintiff signed an arbitration agreement with his employer and was assigned to work for one of  
 5 his employer’s customers. *Id.* at 784. He thereafter filed suit against his employer and the non-  
 6 signatory employer for, *inter alia*, violations of the Labor Code. The operative complaint in  
 7 *Garcia* alleged “each and every one of the acts and omissions alleged herein was performed by,  
 8 and/or attributable to, all DEFENDANTS, each acting as agents and/or employees, and/or under  
 9 the direction and control of each of the other DEFENDANTS, and that said acts and failures to  
 10 act were within the course and scope of said agency, employment and/or direction and control.”  
 11 *Id.* at 785. It also alleged that the plaintiff was “under the direction and control of each of the  
 12 other DEFENDANTS.” *Id.* at 785.

13 Here, Plaintiff has alleged a nearly identical situation. *Garcia* and Plaintiff here were both  
 14 bound by similarly-worded arbitration agreements, covering actions arising out of the  
 15 employment relationship. As in *Garcia*, Plaintiff’s operative complaint alleges an agency theory  
 16 of liability against NEA and Amazon as joint employers. Plaintiff admittedly attributes all of the  
 17 alleged violations jointly to both defendants (NEA and Amazon), and, in fact, does not  
 18 distinguish between their alleged contributions, choosing instead to refer to them jointly as simply  
 19 “DEFENDANTS.” Thus, Plaintiff alleges Amazon’s actions are “intimately founded in and  
 20 intertwined” with her employment with NEA, which is covered by the Agreement to arbitrate. As  
 21 was the case in *Garcia*, here Plaintiff’s employment-based claims arise under the alleged joint  
 22 direction and control of co-defendants, one of whom is a signatory to an arbitration agreement.  
 23 Accordingly, this court should follow the court of appeal in *Garcia*, which affirmed that, under a  
 24 theory of equitable estoppel, the non-signatory was entitled to compel arbitration of plaintiff’s  
 25 claims against it under the subject arbitration clause. *See also Chico v. Hilton Worldwide, Inc.*,  
 26 CV 14-5750-JFW, 2014 WL 5088240, at \*14 (C.D. Cal. Oct. 7, 2014) (recognizing that a  
 27 nonsignatory may enforce an arbitration agreement); *Ortiz v. Volt Mgt. Corp.*, 16-CV-07096-  
 28 YGR, 2017 WL 2404977, at \*3 (N.D. Cal. June 2, 2017) (“findi[ng] that principles of equitable

1 estoppel apply [to] allow [a nonsignatory] to compel plaintiff into arbitration); *Lucas v. Michael*  
 2 *Kors (USA), Inc.*, CV1-81608-MWF, 2018 WL 6177225, at \*7 (C.D. Cal. Aug. 20, 2018);  
 3 *Vasquez v. San Miguel Produce, Inc.*, 2D CIV. B287696, 2019 WL 1771021, at \*5 (Cal. App. 2d  
 4 Dist. Apr. 23, 2019).

5 It is also well-established California law that a nonsignatory to an arbitration agreement  
 6 may enforce an arbitration agreement when they are intended third party beneficiaries of an  
 7 arbitration agreement. See *Doulon v. USSA Cas Ins. Co.* (2008) 167 Cal. App. 4th 412, 424; see  
 8 also *Mundi v. Union Sec. Life Ins. Co.* (9th Cir. 2009) 555 F.3d 1042, 1045 (“General contract  
 9 and agency principles apply in determining the enforcement of an arbitration agreement by or  
 10 against nonsignatories.”). “Whether the third party is an intended beneficiary or merely an  
 11 incidental beneficiary involves construction of the intention of the parties, gathered from reading  
 12 the contract as a whole in light of the circumstances under which it was entered.” *Eastern*  
 13 *Aviation Grp., Inc. v. Airborne Express, Inc.* (1992) 6 Cal. App.4th 1448, 1452. Here, the  
 14 Agreement expressly states that Plaintiff agreed to arbitrate any disputes “that may arise out of  
 15 the employment context” against her “Worksite Employer [NEA]” and its “agents.” Nyhyan  
 16 Decl. ¶ 4, Exh. A at 1.A. Plaintiff expressly alleges that Amazon is such an agent responsible for  
 17 carrying out “a joint scheme, business plan or policy” with NEA. See Dkt. 1, Compl. ¶ 9.  
 18 Accordingly, Amazon is entitled to enforce the agreement as an intended third-party beneficiary.

19 **5. The Transportation Worker Exemption Does Not Apply.**

20 Plaintiff has argued that the FAA does not apply because she is exempt as a  
 21 “transportation worker” although she admits “Plaintiff worked within the state.” Dkt. 30, Joint  
 22 Case Mgmt. Stmt. at p. 2:6-9. Indeed, this is the only argument against the enforceability of the  
 23 Agreement that Plaintiff has ever posited. A thorough examination of the FAA, its purpose and  
 24 the applicable exemption leads to the conclusion that Plaintiff is wrong.

25 Section 1 of the FAA provides a narrow exemption for “contracts of employment of  
 26 seamen, railroad employees, *or any other class of workers engaged in foreign or interstate*  
 27 *commerce.*” 9 U.S.C. § 1 (italics added). The italicized, residual phrase applies to so-called  
 28 “transportation workers,” a term that the Supreme Court has defined as “those workers actually

1 engaged in the movement of goods in interstate commerce.” *Circuit City Stores, Inc. v. Adams*,  
 2 532 U.S. 105, 112 (2001), quoting *Cole v. Burns Int’l Security Servs.*, 105 F.3d 1465, 1471 (D.C.  
 3 Cir. 1997). This “exemption” requires a “narrow construction” to reach only those who are like  
 4 “seamen” and “railroad employees” such that disruption of their work would tend to interfere  
 5 with the flow of goods in interstate or foreign commerce. *Circuit City*, 532 U.S. at 121. And for  
 6 the FAA to accomplish its purpose of furthering federal arbitration policy, the exemption in  
 7 section 1 requires a “narrow construction” using a clear test that avoids “complexity and  
 8 uncertainty” about the enforceability of arbitration agreements. *Id.* at 118, 123, quoting *Allied-  
 Bruce Terminix & Cos. V. Dobson*, 513 U.S. 265, 272-273 (1995).

10 A “narrow” reading of the exemption respects the exemption’s language and underlying  
 11 legislative purpose because Congress deliberately wrote the exemption using a linguistic  
 12 formulation—“engaged in foreign or interstate commerce”—that is narrower than formulations  
 13 that would have extended the exemption to all activities Congress is empowered to regulate under  
 14 the Constitution’s Commerce Clause. *Id.* at 118. Because the exemption was crafted to be narrow,  
 15 courts cannot reasonably hold that local deliverers “are involved in the flow of interstate  
 16 commerce because they facilitate the transportation of goods that originated across state lines.”  
 17 *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 900 (N.D. Cal. 2019).<sup>5</sup> While such an  
 18 attenuated connection to interstate commerce would “be enough under the United States  
 19 Constitution’s Commerce Clause, the FAA is more narrow” in its exemption. *Id.*

20 Drawing the line between local and cross-border deliverers also respects the Supreme  
 21 Court’s instructions that the exemption’s residual clause should “be controlled and defined by  
 22 reference to the enumerated categories of workers which are recited just before it . . . .” *Circuit*  
 23 *City*, 532 U.S. at 115. In other words, the FAA seeks to exempt workers who are “actually  
 24 engaged in the movement of goods in interstate commerce in the same way that seamen and  
 25 railroad workers are.” *Asplundh Tree Expert Co. v. Bates* (6th Cir. 1995) 71 F.3d 592, 601. In  
 26 particular, the exemption “was intended to reach workers who would, by virtue of a strike,  
 27

---

28 <sup>5</sup> Plaintiffs in *Magana* have appealed to the 9th Circuit and filed their Opening Brief on April 15, 2019. Appellee DoorDash’s Answering Brief is due May 13, 2019.

1 ‘interrupt the free flow of goods to third parties in the same way that a seamen’s strike or railroad  
 2 employee’s strike would.’’ *Vargas v. Delivery Outsourcing, LLC*, (N.D. Cal. Mar 14, 2016, No.  
 3 15-cv-03408-JST) 2016 WL 946112, at \*3. Here, Plaintiff is a local delivery driver, and a strike  
 4 by local delivery drivers would not threaten interruption of commerce at the national level. *See*  
 5 *Lee v. Postmates Inc.* (N.D. Cal. Dec. 17, 2018, No. 18-cv-03421-JCS) 2018 WL 6605659 at \*7  
 6 (“A strike by *local couriers* would presumably have no more effect on interstate commerce than a  
 7 national strike of, say, cashiers, shelf-stockers, or any number of other classes of employees who  
 8 are not interstate transportation workers,” emphasis added).<sup>6</sup>

9       Therefore, Plaintiff cannot show that, in making deliveries solely to local customers  
 10 without ever leaving California, she is “engaged in interstate commerce.” Plaintiff does not  
 11 allege that she personally made deliveries across state lines. She concedes that she “worked  
 12 within the state” (*see* Dkt. 30, Joint Mgmt. Stmt. at p. 2:6-9) because, in fact, Plaintiff never left  
 13 California to make any deliveries. Nyhan Decl. ¶ 6. District Judge Phyllis Hamilton of this Court  
 14 in *Magana* found that, consistent with Ninth Circuit authority, “[c]ourts in this district have  
 15 declined to find that a delivery driver engaged in interstate commerce where he did not allege that  
 16 he made interstate deliveries.” *Magana*, 343 F. Supp. 3d at 899 (“[Plaintiff] does not allege that  
 17 he ever crossed state lines as part of his work. As such, there is no allegation that he engaged in  
 18 interstate commerce under the definition of the narrowly-construed term.”), *citing Vargas*, 2016  
 19 WL 946112, at \*4 (rejecting argument that drivers deliver goods that flow in interstate commerce,  
 20 instead finding that “[t]he evidence in this case ... does not support the conclusion that Plaintiffs  
 21 made interstate deliveries even occasionally”); *Levin v. Caviar, Inc.* (N.D. Cal. 2015) 146 F.  
 22 Supp. 3d 1146, 1152 (“Plaintiff, however, has not shown that he or any other similarly situated  
 23 delivery driver ever made trips across state lines.”). Therefore, for the FAA’s transportation  
 24 worker exemption, it is not sufficient that Plaintiff here makes *intrastate* deliveries of goods,  
 25 which may have originated out-of-state. *See id.*

26  
 27       

---

<sup>6</sup> Labor conflicts at the local level do not threaten nationwide interests in the way that strikes  
 28 affecting interstate transportation do. “[A] strike by local delivery drivers . . . would not have  
 such an impact.” *See Levin*, 146 F. Supp. 3d at 1155; *see also Vargas*, 2016 WL 946112, at \*5;  
*Veliz v. Cintas Corp.*, (N.D. Cal. Apr. 15, 2004, No. C 03-1180 SBA) 2004 WL 2452851, at \*10.

1           Just as in *Magana*, Plaintiff is “not [] transportation worker[s] engaged in interstate  
 2 commerce. This Court should follow the sound reasoning of decisions in this District that  
 3 conclude the application of the exemption requires that the delivery driver’s job regularly  
 4 involves interstate travel. *See, e.g., Lee*, 2018 WL 6605659 at \*7 (“Couriers who make *local*  
 5 deliveries are not ‘directly responsible for transporting goods in *interstate* commerce,’ emphasis  
 6 in original); *Vargas*, 2016 WL 946112, at \*5; *Levin*, 146 F. Supp. 3d at 1154; *Veliz v. Cintas*  
 7 *Corp.* (N.D. Cal. Apr. 15, 2004, No. C 03-1180 SBA) 2004 WL 2452851, at \*8. For most courts,  
 8 a local delivery driver making wholly intrastate deliveries is not “engaged in foreign or interstate  
 9 commerce” even if the delivered goods originated at some point outside the state. That is true  
 10 whether the driver delivers food from local restaurants (*Lee, Magana, Levin*) or objects or  
 11 commercial goods that originated out-of-state (*Lee, Magana, Vargas, Veliz*). Whatever is being  
 12 transported, a local delivery worker is not “engaged in interstate commerce” within the meaning  
 13 of the FAA’s narrow exemption if he does “not allege that he made interstate deliveries.”  
 14 *Magana*, 343 F. Supp. 3d at 899.

15           Notably, Congress also crafted the exemption to account for existing grievance procedures  
 16 that were available—or would soon be available—to workers excluded by the exemption at the  
 17 time the FAA was enacted in 1925. *Circuit City*, 532 U.S. at 120-121. The purpose behind the  
 18 exemption was thus not to disfavor arbitration for the exempted classes, but to protect alternative  
 19 dispute resolution schemes that Congress had specifically devised for the exempted classes. Local  
 20 delivery drivers as a group have never been subject to such specialized grievance procedures and  
 21 so courts should be especially hesitant to exclude them from federal arbitration altogether.

22           Defendants anticipate that Plaintiff will likely rely on two state court decisions, *Nieto v.*  
 23 *Fresno Beverage Co., Inc.*, 245 Cal.Rptr.3d 69 (2019) and *Muller v. Roy Miller Freight Lines,*  
 24 *LLC*, No. G055053, 2019 WL 1929662, at \*8 (Cal. Ct. App. May 1, 2019), to argue that she is  
 25 exempt from the FAA’s coverage under the Transportation Worker exemption. *Nieto* is not  
 26 binding on this Court and is factually distinguishable, as the facts admitted by the defendant

27  
 28

1 employer that were the basis for the court’s conclusion in that case are not present here.<sup>7</sup> Unlike  
 2 *Nieto* where the drivers were “subject to and must comply with federal Department of  
 3 Transportation regulations, and other federal laws and regulations governing motor vehicle  
 4 safety,” *Nieto*, 33 Cal. App. 5th at 76, Plaintiff and the drivers she improperly seeks to represent  
 5 make local deliveries in small vans or passenger vehicles, which do not require a commercial  
 6 drivers’ license to operate. Nyhan Decl. ¶ 5. *Muller* is similarly distinguishable because the  
 7 employer was “in the transportation industry” as “a licensed motor carrier company that employs  
 8 truck drivers to transfer freight.” 2019 WL 1929662, at \*1. Not so here where the drivers,  
 9 including Plaintiff, are not truck drivers. Any broader reading of *Nieto* and *Muller* would be  
 10 directly contrary to the decisions in this District discussed above. Moreover, based on the  
 11 foregoing, the Court should follow the straightforward approach of looking at what the workers  
 12 were engaged to do. Indeed, in *Epic Systems*, the U.S. Supreme Court issued yet another clear  
 13 endorsement of arbitration, pointing to the “liberal federal policy favoring arbitration agreements”  
 14 and reminding courts of the FAA’s mandate that they “respect” and “rigorously [] enforce  
 15 arbitration agreements according to their terms.” *See Epic Systems*, 138 S. Ct. 1612, 1621 (2018).  
 16 The Supreme Court further cautioned that the FAA’s “saving clause” has limited application and  
 17 “does not save defenses that target arbitration either by name or by more subtle methods, such as  
 18 by ‘interfer[ing] with fundamental attributes of arbitration.’ ” *Id.* at 1622, quoting *Concepcion*,  
 19 563 U.S. 333, 344 (2011). In other words, the Supreme Court made clear that, given the FAA’s  
 20 mandate in favor of arbitration, this Court should be mindful – similar to the limited application  
 21 of the “savings clause” – to narrowly apply the transportation worker exemption, “such that the §  
 22 1 exclusion [of transportation workers] provision [is] afforded a narrow construction.” *Circuit  
 23 City*, 532 U.S. at 118.

24       B.     **ALTERNATIVELY, IF THE COURT DECIDES THE FAA DOES NOT**  
**APPLY, THE COURT SHOULD STAY PLAINTIFF’S UNPAID WAGES**  
**CLAIM WHILE HER OTHER CLAIMS PROCEED TO ARBITRATION.**

26       The FAA applies to Plaintiffs’ agreement, but even if it didn’t, then California law  
 27

---

28       <sup>7</sup> On May 1, 2019, the defendant employer Fresno Beverage Co. filed a Petition for Review to  
 the California Supreme Court.

1 applies. *See, e.g., Maldonado v. Sys. Servs. of Am., Inc.*, No. 09-542, 2009 WL 10675793, at \*2  
 2 (C.D. Cal. June 18, 2009) (after finding that exemption to FAA applied, compelling arbitration  
 3 under state law). Even under the California Arbitration Act (“CAA”), the Agreement is a fully  
 4 enforceable, valid arbitration agreement, and this action is subject to a stay pending arbitration.  
 5 Under the CAA, the court “shall, upon motion of a party, ... stay the action or proceeding .. until  
 6 an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court  
 7 specifies.” Cal. Code Civ. Proc. § 1281.4. That said, Plaintiff may seek to avoid arbitration  
 8 altogether under Labor Code § 229. First, that section is preempted by the FAA. Even if it  
 9 wasn’t, Labor Code § 229 states in relevant part: “Actions ***to enforce the provisions of this***  
 10 ***article for the collection of due and unpaid wages*** claimed by an individual may be maintained  
 11 without regard to the existence of any private agreement to arbitrate.” Cal. Labor Code § 229  
 12 (emphasis added). “Section 229 is found in article 1 of division 2, part I, chapter 1 of the Labor  
 13 Code, encompassing sections 200 through 244. Thus, if a cause of action seeks to collect due and  
 14 unpaid wages pursuant to sections 200 through 244, that action can be maintained in court,  
 15 despite an agreement to arbitrate.” *Lane v. Francis Capital Mgt. LLC*, 168 Cal. Rptr. 3d 800, 806  
 16 (Cal. App. 2d Dist. 2014).

17 Here, Section 229 clearly does not prohibit arbitration of Plaintiff’s FLSA claim, which is  
 18 based on federal law, not the Labor Code. It similarly does not apply to her claim brought under  
 19 the UCL. Also, the only Labor Code sections from 200 through 244 alleged by Plaintiff’s third  
 20 cause of action for unpaid wages are Labor Code sections 204 (which sets forth lawful timing of  
 21 payment of wages) and 223 (making it “unlawful to secretly pay a lower wage while purporting  
 22 to pay the wage designated by statute or by contract.”) Dkt. 1, Compl. ¶¶ 81, 84. However, there  
 23 is no private right of action for either of these claims. *See Johnson v. Hewlett-Packard Co.*, 809  
 24 F. Supp. 2d 1114, 1136 (N.D. Cal. 2011) aff’d, 546 F. App’x 613 (9th Cir. 2013); *see also*  
 25 *Hennigan v. Insphere Ins. Solutions, Inc.*, 2013 WL 1758934, at \*5-\*6 (N.D. Cal. Apr. 24, 2013)  
 26 (dismissing section 204 claim); *Parsons v. Golden State FC LLC*, 2016 WL 1734010, at \*3 (N.D.  
 27 Cal. May 2, 2016) (“Defendants argue that there is no private right of action for a section 204  
 28 violation. . . . Plaintiffs acknowledge that this is true...”); *Gunawan v. Howroyd-Wright Empl.*

1     Agency, 997 F. Supp. 2d 1058, 1068 (C.D. Cal. 2014) (dismissing Labor Code § 223 claim  
2 because “there is nothing to indicate that the legislature intended to create a private right of action  
3 to remedy violations of sections 221 and 223.”). Because Plaintiff’s claim for unpaid overtime is  
4 made under Labor Code section 510, her claim for overtime must be arbitrated under the  
5 Agreement because this claim is not covered within the scope of § 229. The same is true for her  
6 other claims. *See Lane*, 168 Cal. Rptr. 3d at 806 (holding that “under section 229, [plaintiff] can  
7 maintain only his third cause of action [for unpaid wages]” while his other “statutory Labor Code  
8 claims [for unpaid overtime wages (§ 510), unpaid meal period wages (§§ 226.7, 512), waiting  
9 time penalties (§§ 201-203), and itemized wage statement violations (§ 226.7)] are subject to  
10 arbitration”); see also *Muller*, 2019 WL 1929662, at \*8 (Cal. Ct. App. May 1, 2019).

11 Accordingly, the Court should compel to individual arbitration Plaintiff's FLSA claim and  
12 her claims for failure to provide meal and rest periods, failure to pay overtime, failure to provide  
13 accurate wage statements, recovery of waiting time penalty for failure to timely pay all final  
14 wages, and violation of the UCL. If the Court declines to address the viability of the Section 204  
15 and 223 claims at this time, those claims must be stayed pending arbitration of the other claims.

16 | IV. CONCLUSION

17 For the foregoing reasons, Defendant respectfully requests that the Court compel Plaintiff  
18 to individual arbitration and dismiss her impermissible class action and collective action claims,  
19 and if any viable claims are found not to be arbitrable, to stay this action pending arbitration of all  
20 arbitrable claims.

Dated: May 10, 2019

MORGAN, LEWIS & BOCKJUS LLP

By /s/ Brian D. Fahy  
John S. Battenfeld  
Brian D. Fahy  
Amy A. McGeever  
Attorneys for Defendant AMAZON  
LOGISTICS, INC. (incorrectly sued as  
AMAZON.COM, LLC)